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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-1701

NEWPORT TANKERS CORPORATION,
Petitioner

v.

WILLIAM MICHAEL SIMMONS,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, William Michael Simmons, respectfully submits, for the reasons stated herein, that the Petition for Writ of Certiorari should be denied.

REPLY TO THE QUESTIONS FOR REVIEW POSED BY PETITIONER

I.

There was evidence that the Russian appendectomy on Respondent was negligently performed, proximately causing Respondent's damages.

II.

The decisions by the Courts below are not in conflict with holdings of this Court or other Courts of Appeal.

III.

Petitioner has failed to establish that the Trial Court's Findings of Fact, sustained by the Court of Appeals, are clearly erroneous.

SATEMENT OF THE CASE

Petitioner's "Statement of the Case" adequately complies with Subdivision (e), Rule 23, United States Supreme Court Rules. However, Respondent disagrees with the inaccurate statement, at page 3 of the Petition, that Respondent made an "uneventful recovery" from the appendix removal to which he was subjected in Russia. The Record Summary attached hereto reveals the multitude of complications which Respondent experienced as a proximate result of this operation and the negligent manner in which it was performed.

ARGUMENT IN REPLY TO PETITIONER'S FIRST AND SECOND QUESTIONS

There was evidence that the Russian appendectomy on Respondent was negligently performed, proximately causing Respondent's damages.

* * * * *

The decisions by the Courts below are not in conflict with holdings of this Court or other Courts of Appeal.

* * * * *

Respondent disagrees with Petitioner's attempts to characterize the person who removed Respondent's appendix, as a "surgeon" (Petition at pp. 5, 6, 9, 10, 11, 12), or as a "physician" (at pp. 12, 13), or as "doctor*s*" [plural] (at pp. 3, 12). Petitioner offered *no* evidence to substantiate the medical qualifications, if any, of this individual. Indeed, it is submitted that Respondent's account of the pre-operation activities and this operation itself, as well as the evidence of the results thereof, cast serious doubt on this individual's status. Since Defendant's Exhibit No. 5 (Tr. 76) lists no hospitals for Poti, only a medical school, it may well be that the person who performed this operation was a medical student.

Respondent disagrees with Petitioner's inaccurate claims that the adhesions he had as a result of the Russian operation were "limited" (at pp. 10, 12, 15), or were a "natural consequence" (at p. 4), or a "normal sequel" (at pp. 5, 14) of the first operation. The Record Summary attached hereto demonstrates that Petitioner's adhesions were numerous, extensive and the result of negligence in the performance of the operation in Russia.

Respondent disagrees with Petitioner's inaccurate statement that the Russian operation was "performed successfully" (at p. 5). The Record Summary attached hereto sets out the numerous complications Respondent had which were attributable to this *un*successful operation. In addition, Petitioner's own medical witness, Dr. Tew, testified that with a "successful" appendectomy, the patient will fully recover and be pain-free in four to six weeks (Tr. 32). In this case, Respondent experienced pain and disability until after his corrective surgery—a period of approximately ten months (Tr. 24, 25).

From the foregoing, the Court can discern that Respondent disagrees with all of the Petitioner's positions on, and attempted characterizations of, the material aspects of this case. So have the Trial Court and the Court of Appeals.

Petiitoner has consistently refused to acknowledge the seriousness of the results that Respondent suffered because of the negligent Russian operation and procedures.

Petitioner has consistently refused to acknowledge the effect of the findings and opinions of Dr. John L. Sessions, the Kirbyville, Texas, surgeon who treated Respondent and performed the corrective surgery in March, 1978.

Petitioner now apparently refuses to acknowledge that the decision in this case is consistent, not in conflict, with *Central Gulf Steamship Corp. v. Sambula,* 405 F.2d 291 (5th Cir., 1968) and *Fitzgerald v. A. L. Burbank & Co., Ltd.,* 451 F.2d 670 (2d Cir., 1971).

In this case, the only point of liability passed upon by the Court of Appeals was the negligence of the Russian who performed the operation (Opinion at p. 2). The Court of Appeals stated there was "ample evidence" to support the Trial Court's findings and conclusions of liability on that theory—and Petitioner *admits* that (Petition at p. 6), yet asks this Court to grant a Writ of Certiorari.

Dr. Sessions' testimony, outlined in the Record Summary attached hereto, established that the Russian operation and procedures were negligently performed and caused Respondent's damages.

As to the surgery and treatment provided to Respondent in Russia, this was obtained by Captain Mappin

through Petitioner's Russian agent. Therefore, under both *Sambula* and *Fitzgerald*, any negligence committed in the course of that surgery and treatment is imputed to Petitioner on agency principles. *Sambula*, cited above, 405 F.2d at p. 302; *Fitzgerald*, cited above, 451 F.2d at p. 680.

Dr. Sessions' testimony also established that the operation was not competently performed, that the course of treatment was inadequate, and that the surgery, as performed, was not acceptable medical technique. This evidence showed that the standard of care expressed in *Fitzgerald*, cited above, 451 F.2d at p. 680, was not met in this case.

Finally, the results of this surgery were *not* just "some adverse effect" as Petitioner claims—the list of these complications is stated over ten pages of Dr. Sessions' deposition and summarized in the Record Summary attached hereto.

As noted above, Petitioner has consistently attempted to minimize the harm this surgery did to its seaman—Petitioner has repeatedly tried to avoid the responsibility the law imposes on it because of the "guardian-ward" relationship it has with its seamen. But the facts defy these attempts.

Any United States seaman should expect that an appendectomy will be performed only after appropriate laboratory tests as called for by Drs. Tew and Sessions—that did *not* occur here. He should expect to be given a general anesthetic as called for by Drs. Tew and Sessions —that did *not* occur here. He should expect to be recovered in four to six weeks and pain-free as called for by Dr. Tew—that did *not* occur here.

Finally, he should expect that his surgery will be performed competently, with the degree of care and skill of the average qualified practitioner of the art and science of medicine as called for by *Fitzgerald,* cited above, 451 F.2d at p. 680—that did *not* occur here.

These expectations form the basis of the decisions of the Trial Court and the Court of Appeals in this case. There is no conflict between the holdings in this case and those cases cited in the Petition filed herein.

It is submitted that the Petition for Writ of Certiorari should be, in all things, denied.

ARGUMENT IN REPLY TO PETITIONER'S THIRD QUESTION

Petitioner has failed to establish that the Trial Court's Findings of Fact, sustained by the Court of Appeals, are clearly erroneous.

* * * * *

Petitioner contends that the Trial Court's findings of negligence proximately causing Respondent's damages are "clearly erroneous." Therefore, Petitioner has the burden of establishing to this Court's satisfaction that these findings are "clearly erroneous." Rule 52(a), Federal Rules of Civil Procedure; *Griffin v. Missouri Pacific R. R. Co.,* 413 F.2d 9 (5th Cir. 1969) at p. 13.

Petitioner has not met its burden; and, at most, has only argued that this case might have been decided another way by the Trial Court. That does *not* establish "clear error."

"The attack on the Court's findings of fact is the not unnatural one that the Trial Judge ought not to have found as he did. But this misconceives our function. We do not retry the case. . . ." *Smith v. United States,* 287 F.2d 299 (5th Cir., 1961) at p. 301.

". . . Where the evidence would support a conclusion either way, a choice by the trial judge between two permissible views of the weight of evidence is not clearly erroneous, and the fact that the judge totally rejected an opposed view impeaches neither his impartiality nor the propriety of his conclusions. . . ." *Chaney v. City of Galveston,* 368 F.2d 774 (5th Cir., 1966) at p. 776.

". . . A finding of fact cannot be set aside as clearly erroneous merely because another court may give the evidence a different construction or resolve the ambiguities differently. . . . Nor can an appellate court reverse where the evidence would support a conclusion either way. Where the trial court has decided to weigh the evidence more heavily for plaintiffs, a choice between two permissible views of the weight of the evidence is not clearly erroneous. . . ." *Dickens v. United States,* 545 F.2d 886 (5th Cir., 1977) at p. 890.

Respondent submits that the Trial Court's findings correctly reflect a permissible view of the evidence herein and that Petitioner has failed to show such findings to be "clearly erroneous."

CONCLUSION

Petitioner has failed to demonstrate a basis for granting its Petition for Writ of Certiorari. Therefore, the Petition should be, in all things, denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of the United States Supreme Court and the Counsel of record for the Respondent herein, and that, on the 28th day of April, 1981, three (3) copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari were served, pursuant to United States Supreme Court Rule 33, Para. 1, by depositing same with the United States Postal Service, with postage prepaid, Return Receipt Requested, properly addressed to the post office address of Petitioner's Counsel of record, Mr. Louis H. Beard, P. O. Box 3708, Beaumont, Texas 77704.

MARCH H. COFFIELD

APPENDIX

RECORD SUMMARY

Respondent was a messman or pantryman aboard Petitioner's vessel, the S/T ACHILLES, when it docked at Poti, Russia, a Black Sea port, to unload grain (Tr. 11, 12, 82).

The grain required fumigation prior to unloading and since cyanide was used in this process, the crew was housed in a Poti hotel (Tr. 12, 13, 82). It was about 25 days before unloading actually began (Tr. 83).

On July 8, 1977, after complaining of being ill to Petitioner's Captain, D. H. Mappin, Respondent was taken by the Captain to the Russian port agent, "Inflot", who in turn took Respondent to the only medical facility in Poti (Tr. 13-15). This facility was described by Captain Mappin as primitive (Tr. 101, 102).

After taking Respondent to the office of the Russian agent, Captain Mappin left and no one was with Respondent until after his appendix had been removed (Tr. 16).

Approximately 20-25 minutes after a nurse took some blood from his finger, someone at the Poti facility made the decision to operate on Respondent (Tr. 15). Respondent did not consent to this operation and actively undertook to prevent it but without success (Tr. 15-17).

The Russian operation was performed without the urinalysis or general anesthesia called for by Petitioner's own medical witness, Dr. Tew (Tr. 30, 31, 44). Instead,

Respondent was given only a local anesthesia and was awake throughout the Russian operation (Tr. 16).

During the removal of his appendix, Respondent felt short pains as the Russian was cutting and digging (Tr. 51). Respondent was conscious the whole time and was restrained and kept down (Tr. 15, 51).

After the operation, Respondent was in pain and remained in the Poti facility for about two weeks (Tr. 20, 55). None of the personnel spoke, or apparently understood, English (Tr. 53, 54). Respondent was in bed most of the time and was not encouraged by the personnel to get up and move about (Tr. 54).

When he returned to Petitioner's ship, Captain Mappin determined that Respondent could not return to his regular duties as a pantryman, or even perform light duty, and that Respondent had persistent pain (Def. Ex. No. 2; Tr. 59). Therefore, he was sent home (Def. Ex. No. 2; Tr. 59).

For over 8 months following the Russian operation, Respondent continued to have pain, with discoloration and puffing at the site of the appendectomy incision, until the March 17, 1978, corrective surgery by Dr. John L. Sessions, a Kirbyville, Texas, surgeon (Tr. 21, 68). This compares with the approximate four to six weeks' recovery time that a "successful" appendectomy takes, according to Petitioner's medical witness, Dr. Tew (Tr. 32).

During this corrective surgery, sutures and suture material from the Russian operation were found by Dr. Sessions, and were present in the pathological specimen

(Dr. Sessions' deposition at pp. 60, 92-94; Tr. 65, 66; Pl. Ex. No. 10 at p. 12; Tr. 72).

Dr. Sessions also found numerous, extensive adhesions caused by the Russian sutures, extending approximately three inches in both directions down the large and small intestines, and attached to the posterior wall inside Respondent's back. His bowel was rotated 120 degrees, turned upside down and bound by the adhesions. There was inflammation, or colitis, of Respondent's bowel and infection. A large amount of granulation tissue was present, the tissue was predominantly fibrous and part of it was hyalinized, indicating degeneration (Dr. Sessions' deposition at pp. 49, 54, 63, 64, 66, 71, 73, 74, 92, 97; Tr. 65-67). See also: Def. Ex. No. 1 (Tr. 37) and Pl. Ex. No. 10 at pp. 1, 3, 9, 16 (Tr. 72).

Dr. Sessions was the only doctor to surgically observe the effects of the Russian operation. In his opinion, based on reasonable medical probability, Respondent's reaction and adhesions were caused by the Russian sutures. The adhesions encountered were more extensive than one would find in an appendectomy performed in a competent manner. Respondent's pain, disability and the need for corrective surgery were caused by the Russian procedure and surgery (Tr. 67-69).

Dr. Sessions stated that Respondent received incompetent, inadequate medical attention in Russia and that the performance of an appendectomy under a local anesthesia was not acceptable medical technique in the United States (Dr. Sessions' deposition at pp. 75, 77, 93; Tr. 65, 66).